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Local Broadcast Ownership:	)
An En Banc Hearing,	)
February 12, 1999	)

PREPARED STATEMENT OF J. GREGORY SIDAK

For more than a decade, I have publicly advocated in articles, books, and testimony the Commission's elimination of its various broadcast ownership rules and its reliance instead on basic principles of antitrust law. I believe that a regime of antitrust enforcement is more conducive than the Commission's rules to subtle and unbiased judgments regarding competition in the marketplace for advertising and competition in the marketplace of ideas. I do not believe that the Commission's broadcast ownership rules produce any benefit for consumers, and surely, over the many years in which those rules have been in effect, the Commission has not articulated a methodology and compiled the data with which to substantiate the efficacy of those policies. As the D.C. Circuit stated in *Bechtel* v. *FCC*: "The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time."[1] I have no confidence that empirical analysis would in fact substantiate the Commission's predictive judgments concerning the broadcast ownership rules. I consider it more likely that the rules fail to produce *any* public benefit.

[1] 957 F.2d 873, 881 (D.C. Cir. 1992).

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At the same time, I believe that the Commission's rules have substantial costs. The rules are likely to diminish efficiency in the broadcasting industry by preventing the achievement of economies of scale and scope, one byproduct of which may be to prevent individual stations from having the minimum size of operation to support investment in local program origination. In effect, the Commission's criteria for granting waivers to these rules, and its willingness to allow joint operating agreements, acknowledge that the rules can cause such losses in economic efficiency and diversity of programming. In addition to causing these losses in efficiency and diversity, the cross-ownership rules may compromise the freedom of broadcast speech. If I am correct that the broadcast ownership rules produce no benefits but may produce real costs in terms of lost efficiency, diversity, and freedom of speech, then the balance plainly tips against the Commission's perpetuation of those rules. I therefore conclude that neither the public interest, nor consumer welfare, nor the freedom of speech guaranteed by the First Amendment can be advanced by the continued existence of the broadcast ownership rules.

Last summer, the Newspaper Association of America asked me to comment on whether economic analysis supports the Commission's abolition of its daily newspaper-broadcast cross-ownership rule, which prohibits the common ownership of a broadcast station and a daily newspaper in the same locale. This hearing, of course, does not address the daily newspaper-broadcast cross-ownership rule, but I mention the fact of my earlier testimony for two reasons. First, in the interest of full disclosure, it will benefit the Commission to know on whose behalf I have previously submitted lengthy testimony on a related topic. Second, the general analytical approach of my earlier testimony is applicable as well to the so-called "duopoly rule" and the radio-television cross-ownership rule.

The Commission has justified broadcast cross-ownership rules in the name of promoting "diversity of viewpoints" and promoting "economic competition." Both goals have been irreversibly achieved—and surely for reasons having nothing to do with the Commission's broadcast ownership rules. The Sherman Act and the Clayton Act will suffice to preserve the robust levels of diversity of viewpoints and economic competition that exist today. It is therefore unnecessary for the Commission to retain an industry-specific prophylactic rule. Stated differently, the FCC may safely analyze a potential merger between two television stations in a locale, or between a radio station and a television station in a locale, the same way that the Antitrust Division or the Federal Trade Commission would analyze any other kind of merger in the mass media. Indeed, one must ask the anterior question of why the FCC needs to undertake any antitrust analysis at all when reviewing a license transfer application, given the preexisting jurisdiction of these two federal antitrust enforcement agencies.

The Commission's recurrent justification for cross-ownership rules has been that the electromagnetic spectrum is a scarce resource, and that the attainment of diversity and competition in broadcasting necessitates, paradoxically, the Commission's imposition of airtight regulatory barriers to entry or to the optimal scale and scope of a broadcasting firm. A long line of published scholarship, however, shows that spectrum scarcity cannot logically justify retaining cross-ownership rules. The spectrum scarcity argument has been intellectually demolished in all its variations.[2]

Why, then, do the cross-ownership rules persist in the face of so much demonstrable evidence of the diversity of viewpoints and economic competition? The Supreme Court long ago

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[2] *See, e.g.*, THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 204–19 (MIT Press & AEI Press 1994).

established that government regulation that is ostensibly content-neutral on its face may nonetheless be enforced in a manner that unconstitutionally infringes freedom of speech.[3] The ingenuity of the modern regulatory state requires that the First Amendment bring to bear a healthy skepticism on the assertions of communications regulators that their policies are content-neutral. One must therefore ask whether the cross-ownership rules persist in the face of manifest diversity of viewpoints and economic competition because the rules are an effective means to achieve an unstated goal that differs entirely from the prevention of monopoly in the marketplace of ideas and the marketplace for advertising. If the FCC cannot cogently say, after several decades, what good the various cross-ownership rules serve in a market that is already highly diverse and highly competitive, then one must ask what *bad* those rules might serve. There is, for example, empirical evidence that at least one major policy that the Commission enforced until 1987 on the grounds of increasing the diversity of viewpoints had precisely the opposite effect. News, talk, news/talk, and public affairs formats skyrocketed on both AM and FM radio following the Commission's abolition of the Fairness Doctrine in August 1987.[4]

Economic analysis enables one to identify at least one unstated goal that is advanced by broadcast cross-ownership rules. By constraining a broadcaster's ability to achieve economies of scope with respect to multiple station ownership, a cross-ownership rule increases the degree of asset specificity of the investments made by the broadcaster. The extent of rent extraction to which the broadcaster is vulnerable is an increasing function of the degree of asset specificity of his investment in the licensed television or radio station. One manifestation of rent extraction

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[3] Grosjean v. American Press Co., 297 U.S. 233 (1936).

[4] *See* Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL. STUD. 279 (1997).

imposed on a broadcaster can be content control or censorship, as in the case of incrementally unremunerative programming that the FCC compels the broadcaster to air or incrementally profitable programming that the FCC deters the broadcaster from airing. The broadcaster's ability to resist the FCC's attempt at content control, which the agency ultimately expresses through the threat of denying renewal of the broadcaster's television license, is reduced if the FCC can block the broadcaster's ability to reduce the degree of asset specificity (and hence the cost of mandatory exit from the market) by achieving economies of scope with operation of another radio or television station (or newspaper) in the same locale. The FCC's threat of denial of renewal need not be frequently employed for the strategy of rent extraction to be successful. A cross-ownership rule limits the broadcaster's ability to reduce the extent of his investment that is held hostage to such threats of rent extraction by the FCC. In that respect, a cross-ownership rule—despite being an ostensibly "structural" regulation of the broadcasting industry—is antithetical to a free press.

In short, the broadcast cross-ownership rules cannot produce benefits in terms of competition and the diversity of viewpoints when the market is already competitive and already diverse, and when the antitrust laws already provide an efficacious tool for preserving those conditions. At the same time, the cross-ownership rules impose obvious costs on the efficient structure of the broadcasting industry. Moreover, the cross-ownership rules make broadcasters more susceptible to efforts by regulators to control broadcast content. This insight raises significant First Amendment concerns and may explain the political appeal to some of retaining the rules in the face of the unparalleled levels of economic competition and the diversity of viewpoints in the mass media that have been documented to exist today.